

State of Hawaii
DEPARTMENT OF LAND AND NATURAL RESOURCES
Division of Aquatic Resources
Honolulu, Hawaii 96813

September 12, 2008

Board of Land
and Natural Resources
Honolulu, Oahu

SUBJECT: Resubmittal - Enforcement Action against Maui Snorkel Charters, Inc. for Damaging Coral within the Molokini Shoal Marine Life Conservation District – Final Settlement Offer for Consideration

SUMMARY: This submittal requests the Board to consider and take action on the proposed settlement with Maui Snorkel Charters, Inc. related to the contention that Maui Snorkel Charters, Inc. violated Chapter 190 of the Hawai'i Revised Statutes, Title 13, Chapter 31 of the Hawai'i Administrative Rules, and its Marine Life Conservation District Use Permit for Commercial Activities in the Molokini Shoal Marine Life Conservation District (permit #30) by killing, injuring, and damaging coral within the Molokini Shoal Marine Life Conservation District.

DATES OF INCIDENT: September 29, 2006 through October 6, 2006

AGAINST: Maui Snorkel Charters, Inc., 1455 S. Kihei Rd.
Kihei, Hawai'i 96753

LOCATION: Molokini Shoal Marine Life Conservation District, Maui County, Hawai'i

I. PREVIOUS BOARD ACTION

On January 25, 2008, the Board authorized the Chair to try and negotiate a settlement with MSC to include a commercial use permit suspension of an undetermined time and a payment plan with a present value of not less than \$550,000 and for the Chair to report back to the Board with the outcome of those settlement negotiations. In addition, \$10,000 for administrative costs on top of the payment was to be included in the settlement negotiations. On March 7, 2008 the Responsible Party submitted to the State via a letter to the Attorney General's office a proposed final settlement offer. The letter suggested settlement terms different than those directed by the Board on January 25, 2008, and was found to be insufficient by the Board at its April 11, 2008 meeting. The Board at that time directed Chairwoman Thielen to continue negotiations to attempt to determine a settlement that would be acceptable to the Board.

II. PROPOSED SETTLEMENT OFFER

A proposed final settlement agreement is submitted for the Board's consideration as Exhibit A. The total of payments is \$386,296.99 plus reimbursement of administrative costs in the amount of \$10,618.00 to DLNR; \$250,000 is to be paid immediately. The remainder to be paid within a three year period: \$50,000 on or before December 1, 2009; \$50,000 on or before December 1, 2010; and \$36,296.99 on or before December 1, 2011. These payments are guaranteed by MSC and its principals. Exhibit B.


In addition, the settlement includes a two and one half month suspension of MSC's permit for operating within Molokini Shoal MLCD. MSC will receive credit for two months that its vessel was out of operation following the incident. Two weeks of the suspension will be in effect from September 14 to September 28, 2008. The remaining two weeks will be effective at a time to be determined by the Chair.

III. RECOMMENDATION


"That the Board approve the proposed settlement between the State of Hawaii, Department of Land and Natural Resources, and Maui Snorkel Charters, Inc., as detailed in Exhibits A and B."

Respectfully Submitted,



 DAN POLHEMUS, Administrator
Division of Aquatic Resources

APPROVED FOR SUBMITTAL:



LAURA H. THIELEN
Chairperson

SETTLEMENT AND RELEASE AGREEMENT

I. PARTIES TO AGREEMENT

This Settlement and Release Agreement ("Agreement") is made by and between the State of Hawai'i (including the Department of Land and Natural Resources and the Division of Aquatic Resources), by and through its Board of Land and Natural Resources (hereinafter collectively "DLNR") and Maui Snorkel Charters, Inc., a Hawaii corporation, whose post office address is 1455 South Kihei Road, Kihei, Hawaii 96753 ("hereinafter "MSC"). DLNR and MSC may sometimes collectively be further referred to herein as the "Settling Parties".

II. BACKGROUND AND RECITALS

A. MSC is the owner and operator of the Kai Anela a snorkeling and dive boat generally operating out of Kihei, Maui, Hawaii.

B. MSC is the holder of permit number 030 a Marine Life Conservation District Use Permit for Commercial Activities at the Molokini Shoal Marine Life Conservation District.

C. On or about September 29, 2006, the Kai Anela sank within the Molokini Shoal Marine Life Conservation District.

D. On or about September 29, 2006, through October 6, 2006, the sinking of the Kai Anela resulted in damage to marine coral within the Molokini Shoal Marine Life Conservation District.

E. MSC and DLNR desire to resolve any and all issues regarding the sinking of the Kai Anela and the resulting damage to marine coral within the Molokini Shoal Marine Life Conservation District and to release all claims that the DLNR may have against MSC in accordance with the terms and conditions further described herein.

III. CLAIMS

For the purposes of this Agreement, except as specifically excluded, the term "Covered Claims" includes, without limitation, claims for property damage, lost profits, lost income, and/or other injuries or losses, however denominated, any and all claims, demands, causes of action, obligations, liabilities, fines, administrative cost, reimbursements, suspensions, damages to the reef and marine coral in the Molokini Shoal Marine Life Conservation District, loss of use and damages of any kind, name, nature, or description which the DLNR had, have, or may have against MSC either at law or in equity, whether known, or unknown, and suspected or unsuspected, which arise, concern, or pertain, and/or relate to the sinking of the Kai Anela and resulting damage to marine coral or State of Hawaii property within the Molokini Shoal Marine Life Conservation District.

IV. INTENT

The Settling Parties desire to fully, finally and completely compromise, settle, remise and release the Covered Claims. Thus, upon the execution of this Agreement by the Settling Parties, it is intended that the DLNR shall have absolutely no Covered Claims against MSC with respect to the matters released herein, except for any claims that may arise from the non-performance and/or breach of this Agreement.

V. CONSIDERATION AND RELEASES

The consideration for this Agreement shall be the mutual covenants and representations contained herein together with the following:

A. **Settlement Payment:** In settlement of the Covered Claims, the parties agree that MSC shall pay to the commercial fisheries special fund established by Haw. Rev. Stat. § 189-2.4 (Cum. Supp. 2007) the sum of \$386,296.99 in damages to marine coral within the Molokini Shoal Marine Life Conservation District plus reimbursement of administrative costs in the amount of

\$10,618.00 to DLNR. Payment of \$250,000.00 of the settlement sum plus the \$10,618.00 in administrative costs will be made within 7 days of the day on which the Chairperson of Board of Land and Natural Resources executes this Agreement. This Agreement will not be effective and binding until the above referenced \$260,618.00 has been paid as specified above. The balance of \$136,296.99 will be paid as follows: \$50,000.00 on or before December 1, 2009, \$50,000.00 on or before December 1, 2010 and \$36,296.99 on or before December 1, 2011. If any payment described above is not made within 15 days of written notice and demand for payment sent by certified mail from DLNR to MSC then in addition to other remedies as specified herein DLNR shall have the right to suspend MSC's Marine Life Conservation District Use Permit for Commercial Activities at the Molokini Shoal Marine Life Conservation District and said suspension shall continue unless and until the permit is reinstated by the DLNR or the Board..

All payments shall be made by check payable to the Department of Land and Natural Resources and received by the DLNR, in its Division of Aquatic Resources, at 1151 Punchbowl Street, Room 103, Honolulu, HI 96813, on or before the date payment is due. This Agreement shall be evidenced by a promissory note executed by MSC and guaranteed by Robert Howard Chambers and Sandra Lynn Galam-Chambers a copy of which is attached hereto as **Exhibit A**.

B. Settlement Suspension: The current Marine Life Conservation District Use Permit for Commercial Activities at the Molokini Shoal Marine Life Conservation District held by MSC will be suspended for 3 months and MSC will get credit totaling 2.5 months for the time that the Kai Anela was not in operation after the event in 2006 and the two weeks between September 14, 2008 and September 28, 2008.

C. Release of Covered Claims: In consideration of the above, the DLNR hereby dismiss, waive, release finally and forever any and all Covered Claims which it had, may have had

or have as more fully set forth in Section III above against MSC except as may be otherwise expressly reserved herein.

D. No Right To Trial After Execution of Agreement: It is also understood and agreed by the Settling Parties that from the date the above referenced \$260,618.00 has been paid as specified and thereafter, none of the parties hereto shall have the right to have any of the Covered Claims resolved through a trial whether by administrative hearing, judge or jury, and that after said date, the only remedies available to any of the parties in this case shall be those to enforce compliance with the terms and conditions of this Agreement.

E. Attorneys' Fees and Costs: Except as otherwise stated herein, each party shall bear its own respective attorneys' fees and costs incurred herein.

F. No Admission of Liability: The settlement of this matter is not to be construed as an admission of wrongdoing, fault or liability by MSC, or any action or issues relating thereto. Each party agrees to bear their own respective attorneys' fees and costs incurred herein.

VI. FURTHER AGREEMENTS, COVENANTS, AND REPRESENTATIONS

A. Successors and Assigns. Each Settling Party agrees that this Agreement and the releases given hereunder are made on behalf of, are binding on, and shall inure to the benefit of themselves, and their respective shareholders, officers, directors, partners, limited partners, joint venture partners, past or present employees, employers, affiliates, predecessors and successors in interest, parents, subsidiaries, attorneys, consultants, experts, any related entities, and each of their respective successors, heirs, administrators, personal representatives, attorneys, and assigns.

B. Bar. This Agreement is an absolute bar to all of the Covered Claims released hereunder. The DLNR agree that it will not, at any time, make or bring any claim, demand, or suit

against MSC concerning the Covered Claims released hereunder other than to enforce the terms and conditions hereof (including enforcement of Exhibit A attached hereto).

C. **No Admissions.** This Agreement is not an admission of any negligence, willful misconduct, breach of contract, bad faith, non-disclosure, interference, indemnity, contribution, reimbursement, liability, or fault of any kind whatsoever by any MSC, but is being made to compromise and settle the Covered Claims which are disputed between the Settling Parties and for the purpose of avoiding further controversy, administrative hearings, litigation, and trial expenses related thereto.

D. **Facts.** Each and every Settling Party understands and expressly accepts and assumes the risk of the inaccuracy of the facts with respect to which this Agreement is executed and agrees that this Agreement shall remain effective notwithstanding any such inaccuracies in such facts.

E. **Ownership of Claims.** The Settling Parties represent and warrant to each other that at all times referred to herein have the authority to settle the Covered Claims herein and that no other person other than the Settling Parties had, or has, an interest in the Covered Claims, and that the Settling Parties have not sold, assigned, transferred, conveyed or otherwise disposed of any of the same.

F. **Headings.** The headings included in this Agreement are for convenience only and do not in any way limit, alter or affect the matters contained in this Agreement or the paragraphs that they encaption.

G. **Alteration of the Agreement.** This Agreement shall not be altered, amended, modified or otherwise changed in any respect, or particular whatsoever, except in a writing duly executed by all the Settling Parties. Each and every Settling Party acknowledges and agrees that it

will make no claim, at any time or place, that this Agreement has been orally altered or modified in any respect whatsoever.

H. **Attorneys' Fees.** Except as otherwise stated herein, in any subsequent action to enforce the terms and/or provisions of this Agreement, and as may otherwise be provided herein, the prevailing party shall be entitled to recover the reasonable attorneys' fees and costs incurred.

I. **Understanding.** The Settling Parties represent to each other that the effect of this Agreement has been fully and carefully explained to each of them by their respective personal counsel.

J. **Choice of Law and Venue.** This Agreement shall be governed by and construed in accordance with the law of the State of Hawaii. Any action to enforce this Agreement shall be brought in the Circuit Court of the Second Circuit, State of Hawaii.

K. **No Party Deemed Drafter.** The usual rule that any ambiguity in a document shall be construed against the party drafting the document shall not apply to this Agreement. The Settling Parties shall jointly be deemed to be the drafters of this Agreement.

L. **Entire Agreement.** This Agreement contains the entire agreement between the Settling Parties. The terms of this Agreement are contractual and not a mere recital.

M. **Severability Clause.** It is understood and agreed by the Settling Parties that if any part, term, or provision of this Agreement is held by the courts to be illegal or in conflict with any law of the State of Hawaii, the validity of the remaining portions or provisions shall not be affected, and the rights and obligations of the Settling Parties shall be construed and enforced as if the Agreement did not contain the particular part, term, or provision held to be invalid.

N. **Execution in Counterparts.** This Agreement may be executed in two or more counterparts or by facsimile, and any set of counterparts or facsimiles which are collectively executed by all the parties shall be sufficient proof of this Agreement.

Dated: _____

Maui Snorkel Charters, Inc..

By _____
Its President Robert Chambers

Dated: _____

State of Hawaii Department of
Land and Natural Resources

By _____
Its Chairperson

Approved by the Board of Land and
Natural Resources at its meeting
held September 12, 2008

EXHIBIT B
PROMISSORY NOTE

\$136,296.99

_____, Maui, Hawaii
_____, 2008

FOR VALUE RECEIVED, Maui Snorkel Charters, Inc. a Hawaii corporation, whose post office address is 1455 South Kihei Road, Kihei, Hawaii 96753 hereinafter called "Maker", hereby promises to pay to the order of Department of Land and Natural Resources, whose mailing address is 1151 Punchbowl Street, Room 130Honolulu, HI 96813, and its successors and/or assigns, hereinafter called "Payee", in lawful money of the United States of America, at Payee's above address or such other place as the Payee hereof shall designate in writing, the principal sum of ONE HUNDRED AND THIRTY SIX THOUSAND TWO HUNDRED NINETY SIX DOLLARS AND 99/100 DOLLARS (\$136,296.99) without interest.

The Maker shall pay to Payee paid \$50,000.00 on or before December 1, 2009, \$50,000.00 on or before December 1, 2010 and \$36,296.99 on or before December 1, 2011.

The Maker shall have the option to pay off the entire principal balance of this Promissory Note, or any portion thereof, before said amount is due and payable as per the above stated terms. Such payment will not result in any prepayment penalty.

Any prepayment of a portion of the principal amount of this Promissory Note shall not reduce the monthly payment as long as there is any principal remaining unpaid pursuant to this Promissory Note.

If the Maker fails to make any of the installments as aforesaid, or any portion thereof, within 15 calendar days of when the payment is due Maker shall be deemed in default and the entire debt shall become due and payable without notice at the option of Payee. Failure to exercise this option shall not constitute a waiver of the right to exercise the same at a later time or in the event of any subsequent default.

If this Promissory Note or any part of the indebtedness represented hereby is not paid in accordance with the terms hereof, or is placed in the hands of an attorney for collection, or if suit is brought hereon, the undersigned Maker further shall pay, in any case, all costs and fees of prejudgment and post judgment collection efforts on this Promissory Note as a result of the Maker's default or failure to pay any amounts due hereunder, including, but not limited to, prejudgment and post judgment attorney's fees, deposition costs, telephone expenses, copying costs, paralegal and secretarial time, court costs and any other fees and costs incurred by the Payee or charged the Payee by any attorney for the purposes of enforcing the Payee's rights hereunder to the maximum amount allowed by law.

Payee may accept late payments or partial payments even though marked "payment in full" without losing any of Payee's rights under this note. No such partial payments shall be deemed an accord and satisfaction.

It is hereby expressly understood and agreed that any requirement for presentment for payment of this Promissory Note, demand to pay the same, protest and notice of protest and dishonor thereof, is hereby waived.

All obligations of the undersigned herein shall be joint and several.

It is the intention of the parties hereto that this Promissory Note and the performance hereunder, and all suits and special proceedings hereunder, be construed in accordance with, under and pursuant to the laws of the State of Hawaii, and that in an action, special proceeding or other proceeding that may be brought arising out of, in connection with, or by reason of this Promissory Note, the laws of the State of Hawaii shall be applicable and shall govern to the exclusion of the laws of any other forum, without regard to the jurisdiction in which any action or special proceeding may be instituted.

The parties hereto shall and they hereby do waive trial by jury in any action, proceeding or counterclaim brought by any of the parties hereto against the other on any matters whatsoever arising out of or in any way connected with this Promissory Note.

GUARANTOR'S AGREEMENT

For value received, we, Robert Howard Chambers and Sandra Lynn Galam-Chambers whose mailing address is P.O. Box 1018, Kihei Hawaii, 96753, ("Guarantor") do hereby jointly and severally guarantee payment of all sums required to be made hereunder by the Maker. If the Maker defaults on any payment of this Promissory Note according to its terms, Guarantor will pay the unpaid balance thereof on demand. Guarantor hereby waives notice of acceptance, notice of non-payment, protest and notice of protest with respect to the obligations set forth above. Guarantor promises to pay, in any case, all costs and fees of prejudgment and post judgment collection efforts to enforce the terms of this Guarantee including, not limited to, all reasonable attorneys fees.

The Maker has executed this Promissory Note on _____ 2008.

Maui Snorkel Charters, Inc..

By _____
Its President Robert Chambers
"Maker"

Robert Howard Chambers
"Guarantor"

Sandra Lynn Galam-Chambers
"Guarantor"